

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SHONEA MARIE GREENE,)	
)	
Petitioner,)	2:06-cv-1528-KJD-PAL
)	
vs.)	
)	ORDER
SHERRY FOSTER, <i>et al.</i> ,)	
)	
)	
Respondents.)	
	/	

This action proceeds on a petition for a writ of habeas corpus by petitioner Shonea Greene, a Nevada prisoner. Before the court is respondents' motion to dismiss (docket #11).

I. Procedural History

Petitioner was charged on April 2, 1999, in the Eight Judicial Circuit Court for Clark County with one count of murder. Exhibit 1.¹ Petitioner entered into an *Alford* plea, and was convicted of second degree murder on December 7, 1999. Exhibits 2 and 3. Petitioner was sentenced to twenty-five years in prison, with parole eligibility in ten years. Exhibit 4. A judgment of conviction was entered on April 25, 2000. *Id.* Petitioner did not appeal.

On March 15, 2002, petitioner filed a motion for appeal/post-conviction relief with

¹ The exhibits cited in this order are those filed by respondents in support of the motion to dismiss, and are located in the record at docket #12.

1 the Nevada Supreme Court. Exhibit 5. On April 11, 2002, the Nevada Supreme Court dismissed the
 2 appeal, finding it was untimely filed and that the court lacked jurisdiction to consider an appeal.
 3 Exhibit 6. Remittitur issued on May 7, 2002. Exhibit 7. Petitioner filed a petition for writ of habeas
 4 corpus with the state district court on February 2, 2005. Exhibit 10. The state court dismissed the
 5 petition, finding it was untimely filed, and that the petitioner did not show good cause to excuse the
 6 late filing. *Id.* Petitioner appealed, and the Nevada Supreme Court affirmed the lower court's
 7 denial. *Id.* Remittitur issued on October 3, 2006. Exhibit 11.

8 Petitioner mailed her federal habeas corpus petition to this Court on November 20,
 9 2006 (docket #5). Respondents moved to dismiss the petition, arguing the federal habeas corpus
 10 petition is untimely filed (docket #11).

11 **II. Respondents Motion for Leave to File Late Pleading**

12 Respondents have moved the Court for permission to file their motion to dismiss after
 13 the filing date expired (docket #13). The motion to dismiss was filed one day late. The Court finds
 14 that there was good cause for the late filing of the motion to dismiss, therefore the Court will grant
 15 the motion, and will treat the motion to dismiss as timely filed.

16 **III. Discussion**

17 The Antiterrorism and Effective Death Penalty Act (AEDPA) amended the statutes
 18 controlling federal habeas corpus practice to include a one-year statute of limitations on the filing of
 19 federal habeas corpus petitions pursuant to section 2254. With respect to the statute of limitations,
 20 the habeas corpus statute provides:

21 (d)(1) A 1-year period of limitation shall apply to an application for a
 22 writ of habeas corpus by a person in custody pursuant to the judgment
 of a State court. The limitation period shall run from the latest of—

23 (A) the date on which the judgment became final by conclusion
 24 of direct review or the expiration of the time for seeking such
 review;

25 (B) the date on which the impediment to filing an application
 26 created by State action in violation of the Constitution or laws
 of the United States is removed, if the applicant was prevented
 from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the federal predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitations under this subsection.

28 U.S.C. § 2244(d). For convictions that became final prior to the enactment of the AEDPA, a petitioner had until April 24, 1997 to file a federal habeas corpus petition. *Patterson v. Stewart*, 251 F.3d 1243 (9th Cir. 2001).

The AEDPA limitations period is tolled while a “properly filed application” for post conviction or other collateral relief is pending before a state court. 28 U.S.C. § 2244(d)(2). The United States Supreme Court has stated that to be properly filed, a petitioner must comply with a state’s time limits for filing an application for post conviction or other collateral relief. *Pace v. DiGuglielmo*, 544 U.S. 408, 414-17 (2005) (holding “time limits, no matter their form, are ‘filing’ conditions” and noting if a state court rejects a petitioner’s habeas petition as untimely then the petition is not “properly filed” under the statute and statutory tolling is not proper).

A. Application to the Instant Case

In the present case, petitioner was convicted on April 25, 2000. Petitioner did not appeal her conviction, therefore the time for filing a federal habeas petition began to run on May 25, 2000, or thirty days after the judgment of conviction was entered in petitioner’s case. 28 U.S.C. § 2244(d)(1)(A). Therefore, petitioner had until May 25, 2001, in which to submit a federal habeas action, unless the time was otherwise tolled. On March 15, 2002, petitioner filed a motion for appeal or for post-conviction with the Nevada Supreme Court. The Nevada Supreme Court dismissed the appeal, finding it was untimely filed. This was not a properly filed appeal, and therefore did not toll the time for filing a federal habeas corpus petition. *Pace*, 544 U.S. at 414-17.

1 Petitioner also filed a state habeas corpus petition on February 2, 2005. This petition
2 also did not toll the limitations period, as it was filed after petitioner's one-year time limitation under
3 section 2244 had already expired. *See Green v. White*, 223 F.3d 1001, 1003 (9th Cir. 2000)
4 (petitioner is not entitled to tolling where the time limitation under the AEDPA has already run).
5 Petitioner mailed her federal habeas corpus petition to this Court on November 20, 2006. The
6 federal petition is untimely filed and must be dismissed unless the petitioner can show that she is
7 entitled to equitable tolling of the limitations period.

8 **B. Equitable Tolling**

9 The AEDPA one-year limitations period is subject to equitable tolling. *See Calderon*
10 *v. United States District Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled in part on*
11 *other grounds, Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998).
12 Equitable tolling is available "if extraordinary circumstances beyond a prisoner's control make it
13 impossible to file a petition on time." *Beeler*, 128 F.3d at 1288. Generally, a litigant seeking
14 equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his
15 rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v.*
16 *DiGuglielmo*, 544 U.S. 408, 418 (2005).

17 Petitioner argues that she was diagnosed with multiple sclerosis during the time for
18 filing a petition in this court and in the state court, was unable to file, and thus she should be excused
19 from the one year statute of limitations (docket #17). After considering the documents filed by the
20 petitioner to support her statement that she was unable to file a timely petition due to her physical
21 and medical condition (docket # 19), it appears that petitioner is not entitled to equitable tolling of
22 the limitations period. The documents establish that petitioner was tested for possibly having
23 multiple sclerosis in October and November of 2000. Petitioner has included a letter from the
24 doctor at Northern Nevada Correctional Center on February 7, 2001. According to the doctor,
25 petitioner had progressed to the point where she could not care for herself in November 2000.
26 However, the doctor notes that she was given medication, and the petitioner's condition became

1 significantly better. Furthermore, the doctor notes that in January 2001, the petitioner was able to
2 leave the hospital, and was living in the women's unit. The doctor also states that the petitioner was
3 also able to stop the use of her cane.

4 It appears that petitioner may not have been able to file her federal habeas corpus
5 petition for a period of time when she was bedridden due to multiple sclerosis. However, the
6 documents provided to this Court show that the petitioner's condition became better between the end
7 of November 2000 and February 2001. Petitioner still had until May 25, 2001, in which to file her
8 federal habeas corpus petition, or to file a state petition that would toll the limitations period.
9 Petitioner did not file anything in the state court until March 15, 2002. Furthermore, even if the
10 statute of limitations period was extended, and did not begin to run until March 2001 due to
11 petitioner's physical/medical disability, petitioner still did not file a state petition for writ of habeas
12 corpus until February 2, 2005. The petitioner also waited until November 20, 2006 to file her federal
13 petition. Petitioner has not shown that she was incapable of filing a petition between March 2001
14 and November 2006. *See Gaston v. Palmer*, 417 F.3d 1030, 1035 (9th Cir. 2005), *modified on*
15 *others grounds*, 447 F.3d 1165 (9th Cir. 2006).

16 Here the petitioner has not met her burden, in that she has not shown that she was
17 incapable of preparing and filing a habeas corpus petition after March 2001. While petitioner alleges
18 she was bedridden and unable to do so, the documents show that as of February 7, 2001, petitioner
19 was no longer hospitalized, was living in the women's unit and no longer needed a cane. Petitioner
20 has not shown why she waited until February 2005 to file a state habeas corpus petition, and until
21 November 2006 to file a federal habeas corpus claim.

22 Equitable tolling of the statute of limitations is not warranted as petitioner has not
23 demonstrated diligent pursuit of her rights and extraordinary circumstances beyond her control.
24 Petitioner's current petition was untimely filed without valid justification for the delay, and therefore
25 will be dismissed pursuant to 28 U.S.C. § 2244(d).
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1 **IV. Certificate of Appealability**

2 In order to proceed with an appeal from this court, petitioner must receive a certificate
3 of appealability. 28 U.S.C. § 2253(c)(1). Generally, a petitioner must make “a substantial showing
4 of the denial of a constitutional right” to warrant a certificate of appealability. *Id.* The Supreme
5 Court has held that a petitioner “must demonstrate that reasonable jurists would find the district
6 court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S.
7 473, 484 (2000).

8 The Supreme Court further illuminated the standard for issuance of a certificate of
9 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

10 We do not require petitioner to prove, before the issuance of a COA, that
11 some jurists would grant the petition for habeas corpus. Indeed, a claim
12 can be debatable even though every jurist of reason might agree, after the
13 COA has been granted and the case has received full consideration, that
14 petitioner will not prevail. As we stated in *Slack*, “[w]here a district court
15 has rejected the constitutional claims on the merits, the showing required
16 to satisfy § 2253(c) is straightforward: The petitioner must demonstrate
17 that reasonable jurists would find the district court’s assessment of the
18 constitutional claims debatable or wrong.”

19 *Id.* at 1040 (quoting *Slack*, 529 U.S. at 484).

20 The court has considered the issues raised by petitioner, with respect to whether they
21 satisfy the standard for issuance of a certificate of appeal, and the court determines that none meet
22 that standard. Accordingly, the court will deny petitioner a certificate of appealability.

23 **IT IS THEREFORE ORDERED** that respondents’ motion for leave to file a late
24 pleading (docket #13) is **GRANTED**. The motion to dismiss shall be treated as timely filed.

25 **IT IS FURTHER ORDERED** that respondents’ motion to dismiss (docket #11) is
26 **GRANTED** and the petition is **DISMISSED** as untimely.

IT IS FURTHER ORDERED that the clerk shall **ENTER JUDGMENT**
ACCORDINGLY.

1 **IT IS FURTHER ORDERED** that petitioner is **DENIED** a certificate of
2 appealability.

3 DATED: March 17, 2009



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6 UNITED STATES DISTRICT JUDGE
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